United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4128

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4128

B
P/S

HECTOR ADOLFO MONTOYA-ALVAREZ,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

CASES CITED

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a) the petitioner, Hector Adolfo Montoya-Alvarez (hereinafter referred to as "Montoya") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on January 21, 1976. That order dismissed an appeal from the decision of Immigration Judge Eugene C. Cassidy in which Montoya was found to be a deportable alien under the Act. The Board granted Montoya thirty days in which to effect his voluntary departure and ordered that he be deported should he fail to exercise the privilege of voluntary departure within the prescribed period. Montoya failed to depart in a timely fashion and on May 17, 1976 filed this petition for review. Since the date

of filing this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

Statement of the Facts

The petitioner is a thirty-six year old alien, a native and citizen of Colombia, who entered the United States on or about February 2, 1969 as a non-immigrant visitor for pleasure. He was originally authorized under the terms of his visitor's visa to remain in the United States until August 6, 1969. On June 23, 1969 during a field investigation by Immigration and Naturalization Service officers, Montoya was found employed in Newington, Connecticut in violation of the terms of his non-immigrant visitor's visa. Having violated the terms of his admission the Service district office in Hartford, Connecticut granted Montoya the discretionary privilege of effecting his voluntary departure from the United States provided he exercise that privilege on or before July 14, 1969. (A.R. p. 13).* Montoya failed to voluntarily depart and instead continued his illegal residence and employment in the United States. Subsequent attempts by the Service to verify the petitioner's departure or locate him were of no avail.

On February 19, 1971, the petitioner and Esperanza Alfonso had a child born in New York (A.R. p. 16). Esperanza Alfonso is also a native and citizens of Colombia and was admitted to the United States on October 12, 1968 as a non-immigrant visitor for pleasure. She was authorized to remain in this country until November 12, 1968. She was thereafter granted a extension of her visit to June 5, 1969. As in the case of the petitioner she

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* References preceded by "AR" are to the page numbers of the certified record which has been filed with this Court.

failed to effect her timely departure from the United States. The petitioner and Esperanza Alfonso were subsequently married on June 8, 1974 and that same month the aliens submitted preliminary applications for immigrant visas based upon their parental relationship to their United States citizen child. By virtue of this application they obtained visa priority dates of July 8, 1974 (AR. 45). As a result of this application the consulate in Bogota, Colombia informed the Service that the petitioner appeared to be illegally residing in the United States.

On December 4, 1974, the Service commenced deportation proceedings against the petitioner with the issuance of an order to show cause and notice of hearing charging that he was deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) as a non-immigrant alien who remained in the United States longer than authorized (AR. 8). On December 10, 1974 the Service also commenced proceedings against Esperanza de Montoya (nee Alfonso) by issuing an order to show cause which similarly charged her with being deportable under Section 241(a)(2) of the Act for having overstayed her authorized visit. (AR. 11). On December 6, 1974, Stephen B. Horton entered his appearance with the Service as attorney of record on behalf of the petitioner.

A consolidated hearing relating to the deportability of both aliens was commenced before Immigration Judge Cassidy on December 16, 1974. That hearing was subsequently continued to January 6, 1976.* During the

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* On December 16, 1974, the Service Trial Attorney lodged additional charges against the petitioner alleging that he was deportable under Section 241(a)(9) of the Act, 8 U.S.C. § 1251(a)(9) as an non-immigrant visitor under Section 101(a)(15), 8 U.S.C. § 1101(a)(15) who failed to comply with the conditions of his status by engaging in employment without authorization (AR. p. 15). See *Londono* v. *United States*, 433 F.2d 635 (2d Cir. 1970).

deportation proceeding the petitioner conceded his alienage and that he was admitted as a temporary visitor authorized to remain until June 4, 1969. He also conceded that he had been employed in violation of his non-immigrant status. (AR. 23-43). Esperanza de Montoya similarly conceded her alienage and that she had failed to effect a timely departure thus overstaying her authorized non-immigrant visit. The aliens, by their attorney, did not concede deportability but instead raised three objections: (1) that deporting the aliens would cause the constructive deportation of their citizen child; (2) that the statutory inability of a citizen child under the age of twenty-one to confer immigration benefits upon parents violates equal protection of the law; and (3) that Section 101(a)(27) of the Act, 8 U.S.C. § 1101(a)(27), discriminates between residents of the Eastern and Western hemispheres and thus violates the aliens' right of equal protection.

At the conclusion of the hearing the Immigration Judge found that the aliens' admissions of the factual allegations contained in the respective orders to show cause established their deportability. He further granted their applications for the privilege of voluntary departure in lieu of deportation (AR 17-22). On January 10, 1975 counsel for the aliens filed an appeal from the decision of Judge Cassidy claiming that the decision was in error by reason of the three constitutional questions raised during the hearing (AR. 6).

On November 10, 1975 during oral argument before the Board counsel notified that tribunal that Esperanza de Montoya had returned to Colombia with the citizen child. He therefore abandoned the grounds of his appeal relating to the unconstitutionality of Section 201(b) of the Act and the claim relating to the constructive depor-

tation of a citizen child by the enforced departure of his alien parents.*

On January 26, 1976, the Board rendered its decision affirming Judge Cassidy's decision and dismissing the appeal of Hector Aldolfo Montoya-Alvarez. The Board also noted that under 8 C.F.R. § 3.4 Esperanza de Montoya's departure from the United States while the appeal was pending constituted a withdrawal of her appeal and

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* Counsel's express waiver of these grounds of appeal is recorded in his opening statement to the Board (AR. 44).

> "Basically the facts in this case I think, are common to many western hemisphere immigrants. We have a man who came in, in 1969, a woman who came in, in 1968, they met, had a child, a U.S. citizen, on Feb. 19, 1971. They married subsequent to that in Hartford, and I must comment to the Board that at this point with respect to the appeal of Esperanza, I am not sure it is moot, but it certainly is not particularly pressing at this point.
>
> She is back in Colombia with the U.S. child. In my written appeal I raised 3 specific points, and I am about to abandon two, one of which is the equal protection argument as to whether aliens can derive from a citizen *over* 21, but not *under* 21. I think my research of that has reveaied it is a fairly settled law, and something I am about to assail. I am also prepared to abandon the ground of constructive deportation, although in abandoning I must suggest my experience has led me to believe in almost every instance there *is* a constructive deportation, and certainly there is one here.
>
> However, the law again, is so firmly settled as to leave me no belief but that to pursue this would be absolutely fruitless. In this case the mother and the U.S. citizen child have returned to Colombia to await their preference. They have a priority date of July 8, 1974. That leads me to the third ground of appeal, which is that the total scheme, the total statutory scheme distinguishing eastern and western hemisphere, is violative of the 5th Amendment due process, and that is the point I would present today."

ordered that her records be returned to the Service without further action by the Board. The Board also granted the petitioner an additional thirty-day voluntary departure period (AR. 3-5).

When at the expiration of that thirty-day period the alien had failed to effect his voluntary departure, the Service issued a warrant for the alien's enforced deportatation. (AR. 1). On May 13, 1976, Montoya was notified to surrender for deportation on May 24, 1976. Only seven days prior to this departure date the alien by his counsel filed this petition for review, thereby obtaining an automatic statutory stay of deportation during the pendency of this action.

Statement of the Issues

WHETHER THE PETITIONER, A CONCEDEDLY DEPORTABLE ALIEN, HAS A RIGHT TO REMAIN IN THE UNITED STATES PENDING THE ISSUANCE OF AN IMMIGRANT VISA BECAUSE HE IS THE FATHER OF A UNITED STATES CITIZEN CHILD AND THEREFORE HIS REMOVAL WOULD INFRINGE ON THE CHILD'S RIGHT TO REMAIN IN THE UNITED STATES.

WHETHER THE PETITIONER'S ARGUMENT THAT HE HAS A RIGHT TO REMAIN IN THE UNITED STATES IS FRIVOLOUS AND MOOT SINCE HIS CITIZEN CHILD IS RESIDING IN ECUADOR WITH HER MOTHER PENDING THE ISSUANCE OF IMMIGRANT VISAS FOR HER PARENTS.

ARGUMENT

In his papers * supporting this action petitioner's counsel raises an issue which he had previously abandoned on appeal before the Board of Immigration Appeals because he perceived the law against that claim as being "so firmly settled as to leave . . . no belief but that to pursue this would be absolutely fruitless". Despite his concession of this issue during the administrative proceedings petitioner's counsel now seeks to resurrect that previously abandoned claim, *i.e.*, that petitioner's deportation is an infringement upon the constitutional rights of his citizen child, by rephrasing that argument as relating to the child's right to remain in the United States.** We agree with the legal analysis of petitioner's counsel when he appeared before the Board of Immigration Appeals and respectfully submit that his contention on this petition for review is totally lacking in merit. Our charge

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* The Civil Appeals Management Program scheduling order relating to this petition provided for the filing and service of the petitioner's brief and appendix on or before July 19, 1976. On August 2, 1976 respondent's counsel received, by mail, papers labeled as Petitioner's Brief and Joint Appendix, but respondent's counsel was advised by the Clerk's Office of this Court that petitioner's counsel had not as of that date properly filed any brief and appendix in this action. Subsequently, petitioner's counsel submitted a brief and joint appendix together with a motion to extend the date of filing petitioner's brief. The brief and appendix were filed on August 12, 1976.

** The renewal of this claim in this action, despite counsel's remarks before the Board, causes one to ask the same question that was posed in *Avila-Gallegos* v. *Immigration and Naturalization Service*, 525 F.2d 666 (2d Cir. 1975), "Why the appeal?" As the Court in *Avila-Gallegos* noted at ff.1, the alien obtained a substantial reprieve from deportation while asserting his constitutional claim. Similarly, by appealing the Board's decision in this case the alien has enabled himself to remain in the United States pending the issuance of a visa number.

that this action is patently frivolous is based not only upon a long and substantial line of legal authority which necessitates the rejection of the petitioner's argument but also upon the underlying facts in this case which render that argument moot and without merit.

Initially, it is noted that the citizen-child discussed in the record of proceedings was taken by her mother to Colombia prior to the time the administrative appeal was heard before the Board on November 10, 1975. Although her attorney had filed an administrative notice of appeal in her case it appears that the petitioner's wife chose to depart from the United States and return to Colombia with her child while awaiting an immigrant visa. Her decision to depart with her child was voluntary and obviously exercised without direction from federal immigration authorities. Nor has the Service in any way prevented or hindered the return of that child to the United States. Rather the record in this case reflects that a parental decision has been made that the child will remain with her mother until such time as the mother is eligible and desirous of returning to the United States as an immigrant. In this factual context we submit it is absurd to argue, as petitioner's counsel does, that the petitioner's deportation results in the destruction of the child's right to *remain* in the United States. Petitioner's reliance on *Acosta* v. *Gaffney*, Civil Action No. 76-709 U.S.D.C. N.J. (May 12, 1976), (appeal filed, 3 Cir. July 13, 1976), is totally misplaced and unsupported by the record. Rather this action appears to be merely an attempt to remain in the United States until an immigrant visa is available so that the alien will suffer only a slight interruption of his presence and activities in this country. See *Fan Wan Keung* v. *Immigration and Naturalization Service*, 434 F.2d 301, 303 (2d Cir. 1970). In view of the factual circumstances surrounding this action it is submitted that the petition should be denied.

Assuming *arguendo* that the record in this proceeding does not in and of itself render the petition moot and without merit, we further submit that the existing legal authority relating to the petitioner's claim requires the rejection of that claim.

The Courts have consistently rejected the contentions of deportable aliens that their expulsion from the United States in one way or another affected their rights or the legal rights of their citizen-children who are born during their parents' illegal residence in this country. Shortly after the enactment of the Immigration and Nationality Act of 1952 the Supreme Court rejected the charge that it was an abuse of discretion to deny suspension of deportation and effect the removal of alien-parents of a United States citizen despite the fact that the aliens had achieved the statutory prerequisites for that relief. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957). Implicit in the decision of the Court is the conclusion that the citizen-child has no right, constitutional or otherwise, to stay the expulsion of deportable alien-parents. Similarly, in *Aalund* v. *Marshall*, 461 F.2d 710 (5th Cir. 1972), where it was contended that the deportation of an alien would cause the *de facto* deportation of her citizen-children, the Court held it was not an abuse of discretion to enforce the alien-mother's deportation.

Furthermore, Congress' plenary power to regulate the entry of aliens into the United States has withstood constitutional attacks which were similar if not identical to the petitioner's complaint in this petition. See *Faustino* v. *Immigration and Naturalization Service*, 302 F. Supp. 212 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *Encisco-Cardoza* v. *Immigration and Naturalization Service*, 504 F.2d 1252 (2d Cir. 1974); *Gonzalez-Cuevas* v. *Immigration and Naturalization Service*, 515 F.2d 1222 (5th Cir. 1975); *Robles* v. *Immigration and Naturalization Service*, 485 F.2d 100 (10th Cir. 1973); *Dimaren* v. *Immigration and Naturali-*

zation Service, 398 F. Supp. 556 (S.D.N.Y. 1974); *Application of Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969); Cf. *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983; *Swartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir.), *cert. denied*, 357 U.S. 928 (1958); *Noel* v. *Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975).

In *Gonzalez-Cuevas*, *supra*, the Court considered the claim that the deportation of alien-parents would deprive their citizen-child of her constitutional right to remain in this country. In rejecting that claim the Court stated:

> "Two things are clear (1) Legal orders of deportation to their parents do not violate any constitutional right of citizen children and the orders here are valid orders; (2) Petitioner's violations of the immigration laws create no extraordinary rights in them, directly or vicariously through their citizen children, to retain their illegally acquired residency status in this country while awaiting legalization of their entry and right to remain through the issuance of visas." *Gonzalez*, *supra*, at 1224.

Similarly in *Robles*, *supra*, the Tenth Circuit stated:

> "Finally, Robles argues in broad terms that her deportation is in violation of the Fifth Amendment. In this regard, she claims that it is unconstitutional to thus break up the Robles family and thereby deprive her children of their constitutional right to a continuation of the family unit. The cases cited in support of the foregoing line of argument are inopposite and we deem the argument itself to be without merit. See *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), and *Perdido* v. *Immigration and Naturalization Service*, 420 F.2d 1179 (5th Cir. 1969), and the citation of authority in each. In *Silverman* and *Perido*, con-

> sideration was given to the incidental impact of immigration and naturalization laws on the marriage status and on the family unit where there be minor children involved, and in each case it was concluded that such incidental impact is not in and of itself significant and does not raise constitutional problems. *Robles, supra*, at 102.

See also *Application of Amoury, supra*, at 216.

Despite the repeated rejection by the Courts of these constitutional claims by deportable alien-parents and their citizen-children, the petitioner's counsel seeks to overturn the Board's decision in this matter apparently relying on *Acosta* v. *Gaffney, supra*.* Quite clearly the factual basis for the district court's decision in *Acosta* is nonexistent in this matter by reason of the voluntary departure of the alien-mother and the citizen-child in this case.

Even if the record of proceedings in this action were similar to the underlying facts in *Acosta*, we submit that the rationale behind that decision has previously been rejected in the decisions cited above and its holding should be rejected by this Court. It appears that the district court in *Acosta* relied upon dicta in the dissenting opinion of *Hintopoulos, supra*, and erroneously fashioned a constitutional privilege under the Fourteenth Amendment which is inapplicable in immigration related matters. Initially we note that the Fourteenth Amendment, in unambiguous language, only proscribed *state* action which might interfere with the rights these infant-citi-

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* We note that the Third Circuit in which the *Acosta* appeal is now pending has previously refused to recognize any constitutional claim by a citizen-infant whose parents were ordered deported. *Im* v. *Bork* (unreported decision U.S.D.C. W.D. Pa. Civ. 73-1057), *aff'd*, 500 F.2d 1399, *cert. denied*, 419 U.S. 1048 (1974).

zens have but does not prevent federal immigration authorities from carrying out the mandate of Congress. See *District of Columbia* v. *Carter*, 409 U.S. 418, 424 (1973); *Truax* v. *Corrigan*, 257 U.S. 312, 340 (1921); *Noel* v. *Chapman*, *supra*, at 1027. Moreover, to allow any other result would circumscribe the plenary power of Congress in the area of immigration, see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), and place the petitioner in a position of precedence over those Western Hemisphere aliens who have applied for immigrant visas and who are awaiting their turn for admission to the United States. *Noel*, *supra*, at 1027; see also *Dimaren*, *supra*, at 506; *Application of Amoury*, *supra*, at 217. Certainly, the solution suggested in *Acosta*, *i.e.*, to relax immigration quotas on a case by case basis or expand the Service's enforcement resources so that aliens can be apprehended before they give birth to children for whom they will assert this newly-fashioned privilege, offers little consolation to those aliens who have steadfastly and patiently obeyed the immigration laws. See *Application of Amoury*, *supra*, at 217.

It is therefore submitted that neither the law nor the facts in this case support the petitioner's contention that the Board's decision should be overturned.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4128

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 23rd day of August, 1976 she served two copys of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Stephen B. Horton, Esquire
Cardwell and Cardwell
108 Oak Street
Hartford, Connecticut 06106

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

23rd day of August, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2202838 Queens County
Term Expires March 30, 1977